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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD MICHAEL RIZZIO, JR., Defendant and Appellant.	E035297 (Super.Ct.No. FSB042359) OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed with modifications.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Melissa A. Mandel and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

In December 2003, a 15-year-old girl told San Bernardino County sheriff's deputies that she and defendant Richard Michael Rizzio, Jr., had a consensual sexual encounter in September 2003 and his wife caught him giving her a kiss. Defendant admitted he had sex with the minor on one occasion and his wife caught him kissing the minor about a week later.

Defendant entered a negotiated guilty plea to engaging in sexual intercourse with a minor under 16 years of age. (Pen. Code,[1] § 261.5, subd. (d).) The court suspended imposition of sentence and placed him on three years' probation with terms and conditions.

Defendant appeals, challenging two of his probation conditions: (1) "Submit to and cooperate in a field interrogation by any peace officer at any time of the day or night" and (2) "submit to random polygraph testing by a Probation department approved polygraph examiner at the direction of the Probation Officer, as part of the sex offender surveillance program and be responsible for all costs associated with examinations."

1. The Field Interrogation Probation Condition:

Defendant argues the field interrogation probation condition is "overbroad, unreasonable and invalid because it (1) has no relationship to the crime, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." We disagree.

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[1] All statutory references are to the Penal Code unless otherwise noted.

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120, citing § 1203.1.) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct . . . not in itself criminal, and (3) requires or forbids conduct . . . not reasonably related to future criminality . . . .' [Citation.] Conversely, a condition of probation which requires or forbids conduct . . . not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted, abrogated by Proposition 8 on another ground as recognized in *People v. Wheeler* (1992) 4 Cal.4th, 284, 290-292.)

Like the standard probation search condition, a field interrogation probation condition is a correctional tool which can be used to determine whether the defendant is complying with the terms of his probation or disobeying the law. (See *People v. Reyes* (1998) 19 Cal.4th 743, 752 [purpose of an unexpected search is to determine not only whether parolee disobeys the law, a basic condition of parole, but also whether he obeys the law; the condition helps measure the effectiveness of parole supervision]; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1006 [probation is an alternative form of punishment, carrying with it certain burdens, such as a search term, which can be used as a correctional tool].) Here, defendant's field interrogation probation condition will provide practical, on-the-street supervision to him. It is inevitable that he will at some time come into contact with minor females and field interrogation will be used to monitor his compliance with conditions restricting his unsupervised contact with minor females

and the victim. Also, information obtained from field interrogations will provide a valuable measure of his amenability to rehabilitation which is related to his future criminality.

Although the field interrogation probation condition forbids defendant from doing something that is not in itself criminal, that is, "'. . . ignore his interrogator and walk away'" (*United States v. Mendenhall* (1980) 446 U.S. 544, 553), it is related to the purposes of probation as described in *People v. Lent, supra,* 15 Cal.3d 481. It provides officers with a means of assessing defendant's progress towards rehabilitation, it assists them in enforcing his other terms and it deters further criminal activity. Thus, the field interrogation condition serves the purposes of probation and is valid under the *Lent* criteria. (*Id.* at p. 486.)

Defendant also claims the field interrogation condition implicates his Fourth, Fifth, and Fourteenth Amendment rights of personal liberty and security. We find no constitutional violation.

It has long been settled that certain constitutional rights can be limited where appropriate in the probation process. (See *People v. Arvanites* (1971) 17 Cal.App.3d 1052, 1063 [prohibition against planning and engaging in demonstrations was valid where defendant falsely imprisoned a man during a protest rally]; *People v. King* (1968) 267 Cal.App.2d 814, 822-823 [condition of probation proscribing participation in demonstrations valid where defendant battered police officers at an antiwar demonstration].)

While probationers have long been required to "cooperate" with their probation officers, a probationer is not foreclosed from asserting his Fifth Amendment privilege and it would not be inherently uncooperative for him to assert the Fifth Amendment. (See *United States v. Davis* (1st Cir. 2001) 242 F.3d 49, 52 [finding no realistic threat in a requirement to "cooperate" with the probation officer].) Therefore, although defendant must cooperate with the police, he retains the right to assert the Fifth Amendment and his probation cannot be revoked based on a valid exercise of that right. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 427, 434.) Furthermore, law enforcement officers may not engage in harassing questions, searches, or other limitations that, for example, have no relation to the crime for which defendant is under supervision. If the officer inquires into improper matter or otherwise acts improperly, defendant may present evidence at the probation violation hearing to show the interrogation or conduct was arbitrary, capricious, harassing, or otherwise not reasonably related to the purposes for which he is on probation. (See *In re Tyrell J.* (1994) 8 Cal.4th 68, 87, fn. 5.) Also, defendant may, when questioned, give a truthful answer and his answer may be used at trial without offending the Fifth Amendment. His obligation to answer questions truthfully is the same obligation borne by any witness at a trial or before the grand jury. (*Minnesota v. Murphy*, *supra*, 465 U.S. at p. 427.) It is not too onerous to require him, for purposes of rehabilitation and reform, to speak truthfully to an officer. Because he has a duty to answer an officer's questions truthfully, unless he asserts the privilege, does not violate his right not to incriminate himself.

In summary, we note the limitation on defendant's liberty is warranted due to his status as a felon. The condition is sufficiently narrow to serve the interests of the state -- his reform and rehabilitation -- while requiring him merely to submit to and cooperate in a field interrogation. And, any *custodial* interrogation that might follow a field interrogation would be subject to the requirements of *Miranda v. Arizona* (1966) 384 U.S. 436. In these circumstances, we conclude the condition is reasonable and not overbroad.

2. The Polygraph Testing Probation Condition:

Citing *People v. Miller* (1989) 208 Cal.App.3d 1311 and *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, defendant argues the polygraph testing probation condition is overbroad because the trial court erred in failing to limit the questions during the polygraph examination to the possibility of unlawful sex with a minor. We agree the cases cited by defendant support his argument that the scope of the polygraph examination should be limited.

In *Miller*, the defendant was convicted of lewd and lascivious conduct with a minor under the age of 14 years. The reviewing court approved a polygraph examination condition "to monitor defendant's compliance with the condition prohibiting unsupervised contact with young females." (*People v. Miller, supra,* 208 Cal.App.3d at p. 1315.) In *Brown,* the defendant was convicted of stalking and the reviewing court approved a polygraph examination condition "relating to the successful completion of the stalking therapy program and the crime of which Brown was convicted." (*Brown v. Superior Court, supra,* 101 Cal.App.4th at p. 321.)

We make an analogous ruling in this case: The polygraph examination condition must be limited to questions relating to defendant's criminal conduct, e.g., contact with the victim or her family and with females under the age of 18 years, and to the court ordered sex offender program.

Defendant also argues that in *Brown v. Superior Court, supra,* 101 Cal.App.4th 313, the reviewing court held that a trial court must determine whether a defendant has the ability to pay before it can condition probation on payment of the polygraph examinations. (*Id.* at pp. 321-322.)

In *Brown,* the reviewing court "note[d] that a trial court may order a defendant to pay for reasonable costs of probation; however, such costs are collateral and their payment cannot be made a condition of probation. [Citations.] Moreover, before ordering a defendant to pay costs of probation, the court must make an inquiry and determination of the defendant's ability to pay and the amount of payment. [Citation.] Here, however, the requirement that the defendant pay for periodic polygraph testing is an integral part of polygraph condition 10(o) which require[s] the defendant to '[u]ndergo periodic polygraph examinations at defendant's expense . . . .' As such, payment of the costs of the polygraph testing is not collateral, but a condition of probation. [Citations.] . . . Pursuant to section 1203.1b, however, before requiring Brown to pay all or a portion of the reasonable costs associated with periodic polygraph testing, the court must make an inquiry and determination regarding his ability to pay, and issue a separate order for the payment of such costs. [Citations.] This order can be enforced through a civil action -- not through contempt proceedings, or the threat, express or implied, of revocation of

probation. [Citations.]" (*Brown v. Superior Court, supra,* 101 Cal.App.4th at pp. 321-322.)

Similarly, in the case before us, the requirement that defendant pay for polygraph testing is an integral part of the polygraph condition that requires him to "be responsible for all costs associated with examinations." As such, payment of the costs of the polygraph testing is not collateral, but a condition of his probation. However, the trial court failed to make an inquiry and determination regarding his ability to pay all or a portion of the reasonable costs associated with the polygraph testing. Thus, as the People acknowledge, the case must be remanded with instructions for a hearing to determine the appropriateness of the payment and payment amount.

DISPOSITION

The judgment is modified as follows: the polygraph testing probation condition is limited to questions related to the crime of which defendant was convicted and the sex offender surveillance program. Payment of the costs of such testing shall not be included in this condition of probation. Before the court may order defendant to pay any or all of the reasonable costs of the polygraph testing, it must, pursuant to section 1203.1b, make

an inquiry and determination as to his ability to pay and determine the amount of payment. As modified, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

WARD
J.

GAUT
J.